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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JERRY JAMGOTCHIAN et al.,

Plaintiffs and Appellants,

v.

CITY OF MANHATTAN BEACH et al.,

Defendants and Respondents.

B208518

(Los Angeles County Super. Ct.
Nos. BS110543 and YC056252)

APPEAL from judgments of the Superior Court of Los Angeles County, Dzintra Janavs, David P. Yaffe and Andrew C. Kauffman, Judges. Affirmed.

Ervin Cohen & Jessup, Karina B. Sterman and Rodney C. Lee for Plaintiffs and Appellants.

Robert V. Wadden, Jr., City Attorney, for Defendants and Respondents City of Manhattan Beach, Robert Wadden, Richard Thompson and Daniel Moreno.

Law Offices of Patricia A. Painter and Patricia A. Painter for Defendants and Respondents Mike Davis and 511 Development Corporation.

INTRODUCTION

This consolidated appeal is from two judgments in favor of defendants, which followed an earlier judgment and an order denying plaintiffs' equitable motion for relief from judgment. All three actions concerned plaintiffs' suit against the City of Manhattan Beach (City) and the owner and builder of a house on property adjacent to plaintiffs' property. Plaintiffs' actions alleged that the City illegally permitted and approved the building of a house that exceeded height limitations in the Manhattan Beach Municipal Code (Municipal Code). We conclude that the res judicata doctrine bars the second and third actions. The primary right under which plaintiffs sued in their first action was that City approved plans for construction of a house that violated the Municipal Code and exceeded the maximum height allowed by that Code. The judgment in the first action, and the order denying plaintiffs' equitable motion for relief from judgment, barred the second and third actions. This conclusion makes it unnecessary to reach plaintiffs' claims that the trial court erroneously found that the second action was barred by the statute of limitations and the defense that plaintiffs failed to exhaust their administrative remedies. We also find that plaintiffs' failure to comply with Civil Code section 1714.10 barred their civil conspiracy claim against the City Attorney. Plaintiffs' fraud claim against the City and three City employees was barred by collateral estoppel by the order denying equitable relief from judgment in the first action, and the trial court properly struck the fraud claim as a pleading not filed in conformity with a prior ruling limiting the scope of amendments to the complaint in the second action. Plaintiffs have not shown error in the order sustaining a demurrer to the private nuisance claim in the second action, have not met their burden of showing that they can cure defects in their complaint by amendment in that action, and have not shown that the trial court abused its discretion in striking portions of the amended petition and complaint in that action. We find no error in the order sustaining demurrers without leave to amend in the third action. We affirm the judgments.

FACTUAL AND PROCEDURAL HISTORY

This appeal consolidates appeals from judgments in Los Angeles County Superior Court cases BS110543 (*Jamgotchian II*) and YC056252 (*Jamgotchian III*). These two superior court cases followed a judgment, and an order denying relief from judgment, in BS106106 (*Jamgotchian I*), which, although not subject to review in this appeal, have relevance to *Jamgotchian II* and *III*. This factual and procedural history presents these three cases separately. All three superior court cases were brought by plaintiffs Jerry Jamgotchian and Patricia Jamgotchian, Trustees of the Jerry and Patricia Jamgotchian Revocable Family Living Trust dated April 22, 1999 (Jamgotchian) against defendants City, Mike Davis individually and doing business as Mike Davis Custom Homes, and 511 Development Corporation¹ (Davis). *Jamgotchian II* also named as defendants Robert Wadden, Richard Thompson, and Daniel Moreno.

Jamgotchian I:

On November 17, 2006, Jamgotchian filed a petition for writ of administrative mandamus and injunctive relief against City and Davis. It alleged that 511 Development Corporation owned 511 Pacific Avenue in Manhattan Beach (the property) and Davis owned and developed that property, which was adjacent to real property owned by Jamgotchian at 529 Pacific Avenue. The petition alleged that what is built on the property would affect the view to the Pacific Ocean, Manhattan Beach city views, and the value of Jamgotchian's property.

The petition alleged that on June 16, 2006, Davis submitted plans to demolish an existing two-story residence and build "a new two-story plus basement" 8,000 square-foot house on the property. The City's Municipal Code limits building heights for each zoning and area district or as modified by an overlay district. Municipal Code section 10.60.050(C) regulates height limits. It requires (1) determination of the reference

¹ While this appeal was pending, defendant 511 Development Corporation filed for Chapter 11 bankruptcy and an automatic stay was in effect as to this defendant. As that stay remains in effect, the decision in this appeal does not apply to defendant 511 Development Corporation.

elevation (the average elevation of the four corners of the lot), and (2) a limitation that no building exceeds the maximum allowable height above existing grade or finished grade, whichever is lower, by more than 20 percent. One exception to Section 10.60.050(C) authorizes the Community Development Director to “approve measuring height from local grade adjacent to an existing or planned building that is adjacent to a street where substantial grading occurred which lowered the street, which, in turn, affected the elevation of the street property line.” Under this exception, the petition alleges, the Director does not use the elevation of property corners along the affected property line; instead the Director uses higher elevations reflecting what the elevations would be had the elevation of the property line not been “affected.”

After Davis submitted his application, the Community Development Director invoked the exception to approve a maximum building height of 123.59 feet; without the exception, the maximum building height would have been 120.20 feet. The petition alleged that this 3.39-foot difference adversely impacted the view from Jamgotchian’s home. The petition alleged that the Director’s determination was erroneous and an abuse of discretion because: (1) although the property was adjacent to Ardmore Avenue, no substantial grading of Ardmore occurred next to the property; (2) grading on Ardmore next to the property was mostly “fill” (adding material) rather than “cut” (removing material), and did not lower the street; (3) even if Ardmore were lowered next to the property, such lowering did not affect the elevation of the property line at the level of the street, due to the slope of the property. The petition alleged that even if the exception applied, lowering the street property line created a 1.1-foot difference in elevation, not a difference of more than 3 feet as the Director determined.

Jamgotchian filed an appeal to the City Planning Commission challenging the Director’s height determination, which appeal was denied on September 27, 2006. Jamgotchian then appealed the Planning Commission’s decision to the City Council, which denied the appeal by resolution on October 17, 2006. The petition thus alleged that Jamgotchian had exhausted their administrative remedies.

The petition for writ of administrative mandate alleged that the City erred and prejudicially abused its discretion because the findings in the City's resolution did not support the City's decision and were not supported by the evidence. The petition sought a peremptory writ of mandate directing the City to grant Jamgotchian's appeal, to determine that the maximum building height for the property was 120.20 feet, and to void existing permits providing otherwise and to reissue them with the 120.20-foot maximum building height.

The cause of action for injunctive relief alleged that the City's decision was contrary to law, unsupported by the evidence, and would permit construction of a residence exceeding the allowable height, which would adversely affect Jamgotchian's views and property value. The petition sought a preliminary and permanent injunction restraining and enjoining Davis from building a structure on the property exceeding 120.20 feet, and restraining and enjoining City from issuing any permit, inspection approval, or certificate of occupancy for any construction exceeding that maximum building height.

On March 8, 2007, the trial court denied the petition for writ of mandate. On March 22, 2007, the trial court entered a judgment in favor of City and Davis and against Jamgotchian.

Plaintiffs' Motion for Equitable Relief from Judgment in Jamgotchian I:

Jamgotchian did not appeal this judgment, but on August 21, 2007, filed a motion for equitable relief from judgment on the ground that it was obtained by extrinsic fraud. The motion alleged that Jamgotchian discovered that someone in the City secretly altered and replaced the 123.59-foot maximum building height with two higher maximum building height determinations without informing Jamgotchian, the City Planning Commission, the City Council, or the trial court. The motion alleged that this alteration occurred months before Jamgotchian filed the petition for writ of mandate, and was concealed from Jamgotchian by someone in the City while that petition was pending in the trial court. The motion claimed that the litigation leading to the judgment was a fraud on the court, and neither the trial court, the City Planning Commission, nor the City

Council had yet reviewed the maximum building height determinations actually created for the property or the appropriateness of the methodology used to make the new, higher maximum building height determinations. The motion alleged that at Jamgotchian's request, Riahi Engineering & Surveying performed a survey of the property which established the as-built ridge height as 139.35 feet, more than 15 feet higher than the 123.59-foot height approved by the City Council. The motion also alleged that three documents in the City's file for the proposed project at the property had been excluded from the administrative record in the petition for writ of mandamus proceeding. The motion alleged that several months before the City Council resolution approving the 123.59-foot maximum building height, a July 28, 2006, residential plan check report approved a 135.77-foot maximum building height, which was not disclosed to Jamgotchian or to the trial court in the mandamus proceeding and was withheld from the administrative record in that proceeding. The motion alleged that the day after the City Council approved a 123.59-foot maximum building height, the residential plan check report was altered by handwritten changes which increased the maximum building height from 135.77 feet to 139.47 feet, and this document was also withheld from the administrative record. Jamgotchian's motion alleged that concealment of this evidence was extrinsic fraud that prevented Jamgotchian from fully litigating the case and justified setting aside the judgment.

On December 24, 2007, the trial court denied Jamgotchian's motion for equitable relief from judgment. The order found that Jamgotchian failed to show that the judgment was procured by either extrinsic or intrinsic fraud. The trial court cited evidence produced by the City in opposition to the motion. It showed that the "new" elevations computed by the City after it approved the height on Davis's plans was due to the use of different base lines from which to measure elevations and did not result from any change in the height of the residences of Jamgotchian and Davis relative to one another. Jamgotchian did not appeal the order denying the motion for relief from judgment.

Jamgotchian II:

On August 17, 2007, Jamgotchian filed a petition and complaint for writ of administrative mandamus and for injunctive relief against City and Davis. The complaint essentially alleged the same facts as would be alleged in the motion for relief from judgment in *Jamgotchian I* filed four days later on August 21, 2007: that in a document withheld from Jamgotchian and from the administrative record, the July 28, 2006, residential plan check report approved a maximum building height of 135.77 feet for the property; that on October 18, 2006, the day after the City Council resolution denying Jamgotchian's appeal of the determination of a 123.59-foot maximum building height, handwritten changes increased the maximum building height from 135.77 feet to 139.47 feet, without the City Council's approval, and the document was withheld from Jamgotchian and the trial court during *Jamgotchian I*; and that the survey requested by Jamgotchian and performed by Riahi Engineering & Surveying established the as-built ridge height maximum as 139.35 feet.

The complaint alleged that Jamgotchian filed a new appeal challenging the secretly modified 139.47-foot maximum building height reflected in the June 28, 2007, internal planning division memorandum and made two requests for a hearing before the City Planning Commission. The complaint alleged that on July 20, 2007, defendant Thompson, the City's Director of Community Development, denied Jamgotchian's appeal and requests for a hearing.

In its cause of action petitioning for a writ of administrative mandate against the City, the complaint alleged that the 139.57-foot maximum building height violated Municipal Code section 10.60.050, and that the City erred and prejudicially abused its discretion by:

- (1) failing and refusing to hold a hearing on either the 135.77 or the 139.57-foot maximum building height determinations;
- (2) failing and refusing to hear Jamgotchian's appeal of approval of the 139.57-foot maximum building height determination;

(3) making determinations regarding the 135.77 and 139.57-foot maximum building heights which were not supported by findings of fact; and

(4) making determinations regarding the 135.77 and 139.57-foot maximum building heights not supported by the evidence and which the City Planning Commission and City Council did not approve. Jamgotchian sought a writ of mandate directing the City to hold a public hearing on the maximum building height and to void existing permits and to reissue them with the correct maximum building height.

The cause of action for injunctive relief against the City and Davis alleged that the City Planning Commission made erroneous changes to the maximum building height that permitted construction of a house exceeding the allowable height that would affect Jamgotchian's views and property value adversely. This cause of action sought a preliminary and permanent injunction enjoining Davis from further construction at the property and enjoining the City from issuing any permit, inspection approval, or certificate of occupancy for any construction exceeding the maximum building height.

The City and Davis filed demurrers. The demurrers were based on the ground that there was another action pending (*Jamgotchian I*, BS106106) between the same parties on the same claims and causes of action; that *Jamgotchian I* was res judicata as to claims asserted in *Jamgotchian II*; and that findings in *Jamgotchian I* collaterally estopped Jamgotchian from relitigating claims in this proceeding. Davis's demurrer also asserted that the statutory limitation in Government Code section 65009, subdivision (c)(1)(E) and (F) barred *Jamgotchian II*.

Before the hearing and ruling on the demurrers, the City filed a notice of a related case, *Jamgotchian III*, which was filed on November 13, 2007. On December 24, 2007, the trial court sustained the demurrers, finding that the complaint was based on the same allegations made and rejected in Jamgotchian's motion for equitable relief from judgment in *Jamgotchian I*. The trial court, however, granted Jamgotchian leave to amend to allege facts that were concealed from plaintiffs at the time of the *Jamgotchian I* judgment which induced plaintiffs to believe that construction of Davis's house would obstruct less of plaintiffs' ocean view.

Amended Petition and Complaint in Jamgotchian II:

On February 6, 2008, Jamgotchian filed an amended petition and complaint for writ of mandamus and injunctive relief, adding as defendants Robert Wadden, the City Attorney of Manhattan Beach, Richard Thompson, the Community Development Director of Manhattan Beach, and Daniel Moreno, Manhattan Beach City Planner. The amended petition alleged Jamgotchian's June 25, 2007, discovery of two documents that in *Jamgotchian I* were not provided to plaintiffs, the Planning Commission, the City Council, or the trial court, and which were omitted from the administrative record. These allegations were the same as those alleged in the motion for equitable relief in *Jamgotchian I*, which plaintiffs alleged reflected a maximum building height of 135.77 feet and 139.47 feet. The complaint alleged that these documents showed that City staff approved a maximum building height for the property that exceeded the maximum allowable height and violated the Municipal Code.

The amended petition also alleged that the concealed documents revealed other facts that defendants never disclosed to Jamgotchian until long after the hearing on *Jamgotchian I*, and the defendants' failure to disclose these facts led Jamgotchian to believe that construction on the property would obstruct less of his ocean view. The amended petition alleged that Thompson approved a maximum building height of 139.47 feet, 13 feet higher than that approved by the City Council, significantly higher than the maximum allowable height for any structure in the zoning district, and that this maximum building height allowed three stories to be built instead of the two-story maximum mandated by the Municipal Code. The petition alleged that since the hearing on *Jamgotchian I*, Thompson made misrepresentations to Jamgotchian about the height of the structure at the property that led Jamgotchian to believe that construction of the house on the property would obstruct less of their ocean view. The amended complaint alleged that the 139.47 maximum building height on which the building permit was issued violated City codes, policies, and procedures, which violations were unknown when judgment was entered in *Jamgotchian I* and which led Jamgotchian to believe that construction of the building at the property would obstruct less of their ocean view.

The amended complaint contained a petition for writ of mandate against the City for violation of City codes, policy, and procedures, and sought a writ of mandate directing the City to hold an election to obtain a majority of Manhattan Beach voters in favor of the 139.47 maximum building height, or to recalculate the maximum building height so that it complied with the Municipal Code and other residences in the zoning district and received Planning Commission and City Council approval of a new maximum building height that complied with the Code, and upon such recalculation, defendants should be required to lower the existing roof or remove the illegal third story so that the building complied with the Municipal Code.

The amended complaint sought a preliminary and permanent injunction enjoining Davis from further construction on the property and the City from issuing further permits, inspection approvals, or certificates of occupancy for any construction exceeding the maximum building height or exceeding the number of stories the Municipal Code allowed in that zoning district.

The amended complaint newly alleged a cause of action for private nuisance against Davis, and causes of action for fraud and for conspiracy to commit fraud against all defendants.

The City filed a demurrer to the amended petition and complaint, on the grounds that the amended petition and complaint did not comply with the limited scope of the trial court's grant of leave to amend; that the res judicata doctrine barred the action in that all issues raised were adjudicated in *Jamgotchian I*; that the statute of limitations barred any issue that was not res judicata; that plaintiffs' failure to exhaust administrative remedies barred plaintiffs' allegations as to the 20 percent height limit and illegal third story; and plaintiffs failed to state causes of action for fraud or conspiracy.

Davis also filed a demurrer to the amended petition and complaint, on the grounds that the doctrines of res judicata and collateral estoppel barred the causes of action in the amended petition and complaint; that *Jamgotchian*'s failure to exhaust administrative remedies barred the complaint; that the limitations period of Government Code section 65009, subdivisions (E) and (F) barred the complaint; and that the causes of action for

writ of mandate, injunctive relief, nuisance, fraud, and conspiracy to commit fraud were uncertain and failed to state facts sufficient to state a cause of action.

Davis additionally filed a motion to strike 55 matters from the first amended petition and complaint, on the ground, inter alia, that these matters were not in conformity with the scope of the trial court's grant of leave to amend in its December 24, 2007, order.

On March 26, 2008, the trial court granted Davis's motion to strike the first amended petition and complaint and sustained demurrers by the City and by Davis without leave to amend. The trial court granted the motion to strike because plaintiffs intentionally ignored the court's prior order specifically limiting leave to amend to allege facts showing that some fact was concealed from plaintiffs at the time of judgment in *Jamgotchian I* which induced them to believe that Davis's construction of the house would obstruct less of their ocean view, and plaintiffs used such leave to join new parties and to allege facts and theories in addition to those previously alleged. The trial court sustained demurrers without leave to amend because the first amended petition and complaint did not allege any fact concealed from plaintiffs at the time of the judgment in *Jamgotchian I* which induced plaintiffs to believe that Davis's construction of the house would obstruct less of their ocean view. Because the first amended petition and complaint was based on the same allegations the trial court rejected in plaintiffs' motion for equitable relief from the judgment in *Jamgotchian I*, that judgment barred this action. The trial court also found plaintiffs' attempt to add additional facts by declaration to those alleged in the first amended petition and complaint was improper, and those alleged facts were irrelevant within the meaning of Code of Civil Procedure section 436, subdivision (a).

The trial court entered a judgment of dismissal on April 17, 2008. Jamgotchian filed a timely notice of appeal.

Jamgotchian III:

On November 13, 2007, Jamgotchian filed a complaint for damages and injunctive relief against City and Davis. This complaint contained the same allegations as those of

the amended petition and complaint in *Jamgotchian II*, filed on February 6, 2008. The complaint again alleged Jamgotchian's June 25, 2007, discovery of three documents in the City Planning Division file on 511 Pacific Avenue: (1) the July 28, 2006, residential plan check report stating that the maximum building height was 135.77 feet; this document with Moreno's handwritten notations dated October 18, 2006, reflecting a secret recalculation of the maximum building height to 139.47 feet; and a September 19, 2006, letter from Davis to the City. The complaint alleged that these three documents were never provided to Jamgotchian or to the trial court during *Jamgotchian I*, and that Wadden knowingly excluded them from the administrative record in *Jamgotchian I*. The complaint alleged that the recalculation of the maximum building height for 511 Pacific Avenue from 135.77 feet to 139.47 feet was 15 percent higher than the City Council's approval of a maximum building height of 123.57 feet, and increased the maximum building height to a height greater than the 20 percent requirement in Municipal Code section 10.60.050. The complaint alleged that Davis knew of the 139.47-foot maximum building height, and built the house at the property consistent with the secret recalculation of the 139.47-foot height before Jamgotchian discovered that 139.47-foot maximum building height.

In a private nuisance cause of action against Davis, the complaint contained the same allegations as those in the private nuisance cause of action in *Jamgotchian II*. The complaint alleged a cause of action for conspiracy to commit fraud against all defendants.

The complaint alleged a cause of action for fraud against all defendants, which alleged that throughout the administrative proceedings and during *Jamgotchian I*, the City falsely represented to Jamgotchian that the City approved a 123.59-foot maximum building height, but increased that height to 135.77 feet as of June 16, 2006, and to 139.47 on October 18, 2006. Jamgotchian relied on defendants' misrepresentations and concealments and did not appeal the writ proceeding, and would have appealed the *Jamgotchian I* judgment if Jamgotchian had known of the 139.47-foot maximum building height and the 20 percent height requirement.

Davis and the City demurred to the complaint on the ground that Jamgotchian's two other actions were pending which sought relief based on plaintiffs' challenges to the City's building height determination for the 511 Pacific Avenue construction, that the allegations in *Jamgotchian II* were identical to allegations in this action, and that the rule of concurrent jurisdiction divested the trial court of jurisdiction over subject matter over which another court had already exercised jurisdiction.

Davis moved for judgment on the pleading as to Jamgotchian's private nuisance cause of action, on the ground that a nuisance cause of action cannot be based on allegations that a building blocks light or the view of a neighboring property. The trial court ruled that Davis's motion for judgment on the pleadings should be deemed an amendment to the demurrer previously filed by Davis.

After sustaining defendants' demurrers without leave to amend and ordering the case dismissed, the trial court entered an order of dismissal on April 16, 2008. Jamgotchian filed a timely notice of appeal.

ISSUES

Jamgotchian claims on appeal that:

1. The trial court in *Jamgotchian II* erroneously sustained demurrers to the amended petition and complaint, which pleaded several viable causes of action;
2. The trial court improperly granted the motion to strike the amended petition and complaint in *Jamgotchian II*; and
3. The trial court in *Jamgotchian III* erroneously sustained demurrers to the complaint, which stated several viable causes of action.

DISCUSSION

1. *Jamgotchian II*

Jamgotchian claims on appeal that the trial court erroneously sustained demurrers to the amended petition and complaint in *Jamgotchian II*. Jamgotchian makes several distinct claims of error.

A. *Standard of Review*

A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank – California* (1994) 27 Cal.App.4th 800, 807.) In reviewing the sufficiency of a complaint against a general demurrer, this court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. This court also considers matters that may be judicially noticed. When a demurrer is sustained, this court determines whether the complaint states facts sufficient to constitute a cause of action. When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The plaintiff bears the burden of proving there is a reasonable possibility of amendment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) Plaintiff may make this showing for the first time on appeal. (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386; Code Civ. Proc., § 472c.)

A plaintiff challenging a demurrer on appeal bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law. This court thus reviews the complaint de novo to determine whether it alleges facts to state a cause of action under any legal theory. Because a demurrer tests the legal sufficiency of a complaint, the plaintiff must show the complaint alleges facts sufficient to establish every element of each cause of action. If the complaint fails to plead, or if the defendant negates, any essential element of a particular cause of action, this court should affirm the sustaining of a demurrer. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879-880.)

B. *The Res Judicata Doctrine Bars Jamgotchian II*

Jamgotchian argues that the doctrine of res judicata does not bar claims in the amended petition and complaint in *Jamgotchian II*.

i. *The Judgment in Jamgotchian I and the Order Denying Equitable Relief From That Judgment Are Final*

The March 22, 2007, judgment in *Jamgotchian I* in favor of City and Davis and against Jamgotchian was appealable. The December 24, 2007, order denying Jamgotchian's motion for equitable relief from judgment made on the ground of extrinsic fraud, which motion raised issues not disclosed or which could not be disposed of on appeal from the judgment itself, was also appealable. (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 359; *Estate of Virgl* (1975) 59 Cal.App.3d 590, 595.) No appeals having been taken from either, both the judgment and the later order denying the motion for equitable relief from judgment are therefore final orders.

ii. *Res Judicata, Collateral Estoppel, and the "Primary Right" Theory Which Defines a Cause of Action*

"If all of the facts necessary to show that an action is barred by res judicata are within the complaint or subject to judicial notice, a trial court may properly sustain a general demurrer. [Citation.] In ruling on a demurrer based on res judicata, a court may take judicial notice of the official acts or records of any court in this state."

(*Frommhamen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299

(*Frommhamen*).)

Res judicata has two aspects. "First, it precludes parties or their privies from relitigating *the same cause of action* that has been finally determined by a court of competent jurisdiction. Second, although a second suit between the same parties on a different cause of action is not precluded by a prior judgment, the first judgment operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. [Citations.] This second aspect of res judicata is commonly referred to as collateral estoppel. [Citations.]" (*Frommhamen, supra*, 197 Cal.App.3d at p. 1299.)

The collateral estoppel aspect of res judicata applies to all issues involved in the prior case even though some factual matters or legal arguments which could have been presented in the prior case in support of such issues were not presented. (*Frommhamen*,

supra, 197 Cal.App.3d at p. 1301.) “ ‘Thus, where two lawsuits are brought and they arise out of the same alleged factual situation, and although the causes of action or forms of relief may be different, the prior determination of an issue in the first lawsuit becomes conclusive in the subsequent lawsuit between the same parties with respect to that issue and also with respect to every matter which might have been urged to sustain or defeat its determination. [Citation.] If the legal principle were otherwise, litigation would end finally only when a party could no longer find counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background.’ ” (*Ibid.*) Collateral estoppel, or issue preclusion, prevents relitigation of issues argued and decided in earlier proceedings. (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 717.) “ ‘The doctrine “rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation.” [Citations.] ’ ” (*Ibid.*)

California applies the “primary rights” theory in defining a cause of action. This theory holds that the invasion of one “primary right” gives rise to a single cause of action, even though there might be several remedies available to protect that primary right. (*Frommshagen, supra*, 197 Cal.App.3d at pp. 1299-1300.) Res judicata bars the relitigation of claims conclusively determined in the first action, and also bars relitigation of matters which were within the scope of the action, related to the subject matter, and relevant to the issues which could have been raised. (*Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1674-1675.) “ ‘A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable.’ ” (*Id.* at p. 1675.)

iii. The Jamgotchian I Judgment, and Order Denying the Motion for Equitable Relief From the Jamgotchian I Judgment, Bar Jamgotchian II

Jamgotchian claims that res judicata does not bar *Jamgotchian II* because the nature and type of decisions made by City at issue in *Jamgotchian II* differed from those in *Jamgotchian I*. Jamgotchian claims that in *Jamgotchian I*, the trial court reviewed a single discretionary decision by Thompson, the City's Director of Community Development, to invoke the exception in the Municipal Code to permit homes on Ardmore Avenue to have a higher maximum building height. Jamgotchian claims that in *Jamgotchian II*, the City made separate determinations that violated Municipal Code provisions, and not just those pertaining to Ardmore Avenue properties.

Both claims, however, related to a single primary right, which is that on property next to property owned by Jamgotchian, the City approved construction that violated the Municipal Code and that exceeded the maximum building height allowed by that Code. The amended petition and complaint in *Jamgotchian II* alleged Code violations that could, and should, have been raised in *Jamgotchian I*.

Jamgotchian II also raised issues previously raised in Jamgotchian's motion for equitable relief from the judgment in *Jamgotchian I*. That motion alleged that after entry of the judgment in *Jamgotchian I*, Jamgotchian discovered that someone in the City secretly altered and replaced the 123.59-foot maximum building height (the height which the *Jamgotchian I* judgment affirmed) with two higher maximum building height determinations, which was concealed from Jamgotchian, the City Planning Commission, the City Council or the trial court during *Jamgotchian I*. The motion alleged that had the documents and higher maximum building height determinations not been concealed, Jamgotchian would have argued in *Jamgotchian I* that those new maximum building heights violated the Municipal Code. The motion for relief from judgment relied in part on a survey by Riahi Engineering and Surveying that established the as-built ridge height as 139.35 feet, fifteen feet higher than the 123.59-foot height approved by the City Council and affirmed in the *Jamgotchian I* judgment.

A declaration by John Riahi, a civil engineer and licensed land surveyor who performed surveys for Jamgotchian, stated that in an October 2002 survey of 511 Pacific Avenue, Riahi used the top of a concrete curb on Pacific Avenue, with an assumed elevation of 100 feet, as a benchmark for vertical control purposes. Riahi stated that the 100-foot elevation was arbitrary and not based on sea level datum, City or County vertical control network data, or other specific measurement; it served only as a reference point for all other points in the survey to establish relative elevations.

Riahi stated that the City Planning Department determined an average lot elevation for the project of 97.60 feet. The 26-foot zoning height, added to 97.60 feet, produced the maximum building height of 123.59 feet affirmed in *Jamgotchian I*. An August 22, 2006, field survey of the property used the same reference point for vertical control purposes that Riahi's 2002 survey used, but used an assumed elevation of 115.74 feet instead of 100.00 feet. The 115.74 feet assumed elevation, like the 100.00 feet assumed elevation, was arbitrary and was not based on sea level datum, City or County vertical control network data, or any other measurement. Using the 2002 survey data, the City applied the City-approved average lot elevation procedure to calculate an average lot elevation of 113.47 feet. Adding the 26-foot zoning height to the 113.47-foot average lot elevation yielded an allowable maximum ridge height elevation of 139.47.

Riahi performed two surveys at the request of Davis and Jamgotchian to verify the maximum as built ridge height elevation of the current project. In both "as built" field surveys, "a Ridge Height certification was issued for the 511 Pacific project indicating no Ridge Height violation for this project."

As the trial court found in its order denying Jamgotchian's motion for equitable relief from the judgment, "the alleged 'new' elevations computed by the City after it approved the height shown on real party in interest's plans, was due to the use of different base lines from which elevations were measured, and did not result in any change in the height of the residences of plaintiffs and real parties in interest relative to one another." The trial court found that the *Jamgotchian I* judgment was not procured by either intrinsic or extrinsic fraud.

The complaint in *Jamgotchian II* alleged the same facts as were alleged in the motion for equitable relief from judgment: that the City concealed and withheld documents from the administrative record approving a maximum building height of 135.77 feet; later handwritten changes increased the maximum building height to 139.47 feet; that the Riahi Engineering & Surveying survey established the as-built ridge height maximum as 139.35 feet; and that City wrongly denied Jamgotchian's appeal challenging the 139.47-foot maximum building height and Jamgotchian's request for a hearing before the City Planning Commission. The trial court's adjudication of these claims in its order denying Jamgotchian's motion for equitable relief from the *Jamgotchian I* judgment collaterally estopped plaintiffs from raising them again in *Jamgotchian II*.

Jamgotchian claims that neither Thompson nor the City had discretion to unilaterally approve a permit for a structure exceeding the 31-foot overall height, but instead were required by the City's Municipal Code to hold a city-wide election to obtain voters' approval, and did not do so. First, in *Jamgotchian I* the trial court found that the parties agreed that the height of the structure was 26 feet, not 31 feet. Second, the original complaint in *Jamgotchian II* did not allege that the City was required to hold a city-wide election to obtain voters' approval and did not seek such relief. Third, although the amended complaint and petition in *Jamgotchian II* did make this allegation and seek this relief, these allegations and this relief exceeded the scope of the leave granted by the trial court to amend the complaint; the trial court limited its grant of leave to amend "solely for the purpose of alleging facts that show that some fact that was concealed from plaintiffs at the time of the judgment in [*Jamgotchian I*] induced plaintiffs to believe that less of their view of the ocean would be obstructed by the construction of real party in interest's home." Fourth, this claim is one that should, and could, have been brought in *Jamgotchian I*, as it related to the primary right alleged to have been infringed, which is

that City's approval of construction on property adjacent to plaintiffs' property violated the Municipal Code.²

Thus the *Jamgotchian I* judgment, and order denying the motion for equitable relief from the *Jamgotchian I* judgment, bar *Jamgotchian II*.

iv. *Plaintiffs Have Not Shown That Application of the Res Judicata Doctrine Will Result in Injustice*

Plaintiffs briefly argue that the res judicata doctrine should not be applied if it results in injustice. *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902 states that "when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed." Here the issues are questions of fact. Moreover, plaintiffs have not shown that precluding *Jamgotchian II* by collateral estoppel would result in injustice. Plaintiffs state: "Here, precluding the present suit in *Jamgotchian II* by Appellants will not result in any manifest injustice to appellant or

² Jamgotchian argues that the trial court erroneously prevented plaintiffs from amending their complaint in *Jamgotchian II* to allege that Davis built a three-story structure which violated the Municipal Code and did not correspond to the plans the City approved. This court granted defendant Davis's request for judicial notice of documents in plaintiffs' fourth action against the City of Manhattan Beach and Davis, *Jamgotchian IV* (BS114610), filed on May 2, 2008. The petition for writ of mandate in *Jamgotchian IV* alleged this "as-built" violation, i.e., that the house built on the 511 Pacific Avenue property had three stories, violated the City's Municipal Code, and did not correspond to plans approved by the City for a house with two stories and a basement. The *Jamgotchian IV* petition cited the City's contention in *Jamgotchian III* that plaintiffs were required to exhaust administrative remedies with the City before plaintiffs could raise the "as built" issue in a superior court proceeding, alleged that Jamgotchian had exhausted those administrative remedies, and alleged that the City rejected plaintiffs' administrative complaint, advised Jamgotchian that the house was constructed pursuant to approved plans, and refused to accept the filing of Jamgotchian's appeal. We find that the issue of the "as-built" violation of the Municipal Code and the failure of the house as built to correspond to City-approved plans has been raised and adjudicated in *Jamgotchian IV*. Jamgotchian's appeal from the judgment in *Jamgotchian IV* is now pending in this court. The "as-built" violation is therefore moot in this appeal. To reverse the order striking the "as-built" violations in *Jamgotchian II* would mean that the claim would be litigated twice.

adverse impact upon the public.” Confusingly in the next sentence plaintiffs take the opposite position: “On the other hand, invoking res judicata in light of patent concealment and failure to disclose material documents and information both in the public approvals process and in a litigation before the courts of this State will prejudice both Appellants and the public at large.” ~(*Ibid.*)~ In any case there is no showing how making the determinations in *Jamgotchian I* conclusive results in injustice.

v. *The Bar of Res Judicata Is Being Asserted Against Plaintiffs, Who Were the Same Parties in Both Jamgotchian I and II*

Plaintiffs claim that res judicata does not apply because different parties are involved in *Jamgotchian I* and *Jamgotchian II*. Plaintiffs do not identify those different parties. Defendants in *Jamgotchian I* and *Jamgotchian II* were City, Mike Davis individually and doing business as Mike Davis Custom Homes, and 511 Development Corporation, but the amended petition and complaint in *Jamgotchian II* added defendants Wadden, Thompson, and Moreno. Plaintiffs were the same in both actions.

Three factors pertain to a determination of whether the bar of res judicata applies: 1. Were the issues decided in the prior adjudication identical with those presented in the later action? 2. Was there a final judgment on the merits? 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1015.) Plaintiffs’ claim fails because of the third factor. The addition of three defendants in *Jamgotchian II* does not invalidate the bar of res judicata, because the plaintiffs against whom res judicata is being asserted were the same in both *Jamgotchian I* and *Jamgotchian I*.

C. *It Is Not Necessary to Reach the Statute of Limitations and Failure to Exhaust Administrative Remedies Defenses*

Plaintiffs again claim that the defendants’ demurrers erroneously argued that the 90-day statute of limitations in Government Code section 65009, subdivision (c)(1)(E) barred *Jamgotchian II*, and that plaintiffs had failed to exhaust their administrative remedies before filing the amended petition and complaint in *Jamgotchian II*. The trial court’s orders sustaining demurrers to the complaint and to the amended petition and

complaint, in *Jamgotchian II*, however, made no ruling or finding on the issue of the bar of the statute of limitations or the exhaustion of administrative remedies. This court reviews only errors in orders by the trial court. Given our affirmance of the orders sustaining demurrers on the grounds of the bar of res judicata, it is unnecessary to reach these claims on appeal.

D. Jamgotchian's Failure to Comply with Civil Code section 1714.10 Barred the Civil Conspiracy Claim Against the City Attorney

Jamgotchian claims that the City erroneously argued that the claim against Wadden (the City Attorney) and the City violated Civil Code section 1714.10 because plaintiffs did not obtain a court order permitting them to state a claim for conspiracy against an attorney and the attorney's client. Jamgotchian argues that this statute does not apply where the attorney owes an independent duty to the plaintiff.

Civil Code section 1714.10 prohibits a complaint from alleging a cause of action against an attorney for civil conspiracy with the attorney's client arising from any attempt to contest or compromise a claim or dispute, and which is based on the attorney's representation of the client unless the court enters an order allowing the pleading that includes the civil conspiracy claim to be filed after the court determines that the plaintiff has established there is a reasonable probability that the plaintiff will prevail. (*Id.* at subd. (a).) Section 1714.10, subdivision (c) states an exception to this pre-filing requirement: "(c) This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." Jamgotchian argues that Wadden, as City Attorney for City, owed a legal duty to Jamgotchian as residents of City to enforce the Municipal Code. Jamgotchian cites no authority for the existence of this duty owed by a city attorney to persons living or owning property in the city. Because Jamgotchian has not shown that Wadden owed an independent legal duty to them, they have not shown that the subdivision (c) exception exempted them from the pre-filing requirement in

subdivision (a) of Civil Code 1714.10, and therefore their cause of action for civil conspiracy against Wadden was barred.

E. Jamgotchian's Fraud Claim Against the City and City Employees Was Collaterally Estopped by the Order Denying Equitable Relief From Judgment in Jamgotchian I, and Was Properly Stricken as a Pleading Not Filed in Conformity With the Trial Court's Prior Ruling Limiting the Scope of Amendments to the Complaint in Jamgotchian II

Jamgotchian claims that the amended petition and complaint in *Jamgotchian II* stated a claim for fraud.

With regard to the fraud claim against Davis, Jamgotchian's opposition to Davis's demurrer conceded that the amended petition and complaint did not adequately plead fraud and conspiracy to commit fraud claims against Davis and 511 Development Corporation. By expressly or impliedly agreeing at trial to the ruling objected to on appeal, Jamgotchian has waived the right to attack error. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1687.)

With regard to the fraud claim against defendants City, Wadden, Thompson, and Moreno, plaintiffs alleged that defendants made representations to Jamgotchian which defendants knew were false and in the administrative proceedings in which Jamgotchian challenged the 123.59-foot maximum height determination, defendants knowingly concealed that the house at the property would not be built to comply with the City codes associated with the maximum building height and the number of authorized stories. These claims, however, were considered and rejected by the trial court's order denying Jamgotchian's equitable motion for relief from judgment in *Jamgotchian I*. The order rejected Jamgotchian's fraud claims. Those claims included the allegation that the as-built ridge height of the house at the property was 139.35 feet, which was 15 feet higher than the 123.59-foot maximum building height approved by the City Council; concealment of three documents reflecting increases to the maximum building height; representations by attorneys and representatives of the City throughout *Jamgotchian I* that the maximum building height approved for the property was 123.59 feet and failure

to inform Jamgotchian that the City had approved a new 135.77-foot maximum building height on July 28, 2006, and that on October 18, 2006, someone in the City Planning Division again increased the maximum building height to 139.47 feet, which increases were not disclosed to Jamgotchian. The trial court rejected these fraud claims in its order denying Jamgotchian's motion for equitable relief from judgment in *Jamgotchian I*. Jamgotchian was therefore collaterally estopped from re-alleging those fraud claims in his amended petition and complaint in *Jamgotchian II*.

Moreover, the trial court had authority to strike pleadings not filed in conformity with its prior ruling. (Code Civ. Proc., § 436, subd. (b); *Ricard v. Grobstein, Goldman Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 162.) The trial court's December 24, 2007, order sustaining demurrers to the original complaint in *Jamgotchian II* granted plaintiffs leave to amend "solely for the purpose of alleging facts that show that some fact that was concealed from plaintiffs at the time of the judgment in [*Jamgotchian I*] induced plaintiffs to believe that less of their view of the ocean would be obstructed by the construction of real party in interest's home." The fraud cause of action did not comply with the trial court's order because it alleged new parties without prior leave of the court. (*Shapell Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101, 1107.) It also exceeded the scope of the leave to amend granted by the trial court by alleging a new cause of action. (*Warden v. Kahn* (1979) 99 Cal.App.3d 805, 810.) Therefore the trial court had discretion to strike those allegations. (*Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 829.)

F. Jamgotchian Has Not Shown Error in the Sustaining of a Demurrer to the Private Nuisance Claim in Jamgotchian II

Jamgotchian claims that the *Jamgotchian II* amended petition and complaint stated a claim for private nuisance.

First, the allegation of a new cause of action exceeded the scope of the leave to amend granted by the trial court, and was therefore properly stricken. (*Warden v. Kahn, supra*, 99 Cal.App.3d at p. 810.)

Second, the private nuisance cause of action alleged that the height of the residence at the property violated the City code, interfered with the privacy and view of city lights and the Pacific Ocean from Jamgotchian's adjacent property, and constituted a nuisance within Civil Code section 3479 by interfering with plaintiffs' privacy and the use and enjoyment of their property and caused a significant diminution in the value of plaintiffs' property. California law recognizes no natural right of a property owner to air, light, or an unobstructed view. (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1152.) Because the gravamen of a private nuisance cause of action is interference with use and enjoyment of an interest in private property and California law recognizes no property right in a view, no private nuisance cause of action lies based on the interference with a view from plaintiffs' property. (*Wilson v. Handley* (2002) 97 Cal.App.4th 1301, 1310.)

Plaintiff claims that there is an exception to this rule where the nuisance is otherwise unlawful (*Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 357) or where the claimant can prove a special injury different from that suffered by the general public (*Griffin v. Northridge* (1944) 67 Cal.App.2d 69). Neither exception applies here.

In *Wolford*, a court previously determined that permits for construction that blocked light, air, and view from the plaintiffs' property were valid. (*Wolford v. Thomas, supra*, 190 Cal.App.3d at p. 357-358.) *Wolford* also cited *Taliaferro v. Salyer* (1958) 162 Cal.App.2d 685, 691, which held that "there is no cause of action stated by one landowner for an adjoining landowner's construction of a house and fence which interferes with light and air and which exceeds the building code height limitation." (*Wolford*, at pp. 358-359.) Thus violation of a local governmental height restriction did not necessarily state a cause of action for nuisance. (*Id.* at p. 359.) As *Taliaferro* states, while a local government can restrict the maximum height of buildings, "a violation would not necessarily give a private individual a cause of action therefor. In order to state a cause of action based upon a violation of the building code, plaintiff must show that he has suffered some exceptional damage other than that suffered by the public generally. As plaintiff has no easement of light and air he cannot complain . . . of the

shutting off of light and air to his property. Also, the fact that plaintiff's complaint alleges the value of his property is damaged by the proximity of the unlawful structures does not entitle him to damages nor to have the structures declared a nuisance."

(*Taliaferro v. Salyer*, *supra*, 162 Cal.App.2d at p. 691.)

Griffin v. Northridge did not involve a building whose height exceeded restrictions in the building code. *Griffin* instead involved a series of malicious acts by defendants, who damaged plaintiffs' property by trampling plants, ruining landscaping, moving a malodorous garbage can to a position under plaintiffs' dining room window, casting paint onto plaintiffs' house, applying insulting epithets to a plaintiff, insulting plaintiffs' guests, planting trees whose spreading roots imperiled the foundation of plaintiffs' house, building an unsightly board fence that excluded sunlight, ventilation, and view from portions of plaintiffs' home, and by maliciously dissuading a buyer from buying plaintiffs' house. (*Griffin v. Northridge*, *supra*, 67 Cal.App.2d at pp. 71-72, 73.) The court found that these acts were done by defendants personally and with malice, which was the basis for affirming that these acts would be a nuisance to plaintiffs as occupants of their house. (*Id.* at pp. 73-74.) Although defendants claimed that the fence could not be abated because it did not exceed a statutory 10-foot height limit, *Griffin* found that even if the fence was not ten feet high, it was a nuisance if defendants built it with malicious intent, it interfered with plaintiffs' full enjoyment of their home, and its usefulness to defendants was "subordinate and incidental." (*Id.* at p. 75.) Under the circumstances, it was a nuisance because it, and defendants' other acts, "were of such a nature as to harass and annoy plaintiffs continuously and to interfere with their comfortable enjoyment of life and of their home." (*Ibid.*) *Griffin* is distinguishable from the private nuisance cause of action alleged in the amended petition and complaint, which did not allege a series of malicious acts against Jamgotchian committed by the owner of adjacent property.

For both reasons, we find no error in the order sustaining a demurrer to the private nuisance cause of action in the amended petition and complaint in *Jamgotchian II*.

G. Plaintiffs Have Not Met Their Burden of Showing They Can Cure Defects in Their Complaint by Amendment

Plaintiffs claim the trial court erroneously sustained the demurrer to the amended petition and complaint in *Jamgotchian II* without leave to amend in light of plaintiffs' evidence that they could allege more facts to support their claims if granted leave to amend. Plaintiffs make no showing of the allegations with which they would amend their complaint. Therefore they have not met their burden of demonstrating that there is a reasonable possibility of amendment. The assertion of an abstract right to amend does not satisfy plaintiffs' burden of showing in what manner they can amend their complaint and how it will change the legal effect of their pleading. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.) Plaintiffs have not met their burden of showing they can cure defects in their complaint by amendment.

H. The Order Striking Portions of the Amended Petition and Complaint in Jamgotchian II Was Not an Abuse of Discretion

Plaintiffs claim that the trial court erroneously struck their amended petition and complaint in *Jamgotchian II* because it exceeded the scope of leave to amend granted by the trial court. We have found, *ante*, that the order striking amendments to the complaint did not abuse the trial court's discretion.

2. Jamgotchian III

The trial court properly sustained demurrers to the complaint in *Jamgotchian III*, both because it was substantively the same as the complaint in *Jamgotchian II* and because the judgment and the order denying plaintiffs' equitable motion for relief from judgment in *Jamgotchian* collaterally estopped the *Jamgotchian III* complaint. We find no error in the order sustaining the demurrer to *Jamgotchian II* without leave to amend.

DISPOSITION

The judgments are affirmed. Costs on appeal are awarded to defendants Mike Davis, individually and doing business as Mike Davis Custom Homes, City of Manhattan Beach, Robert Wadden, Richard Thompson, and Daniel Moreno.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.